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No. 07-_____

In the Supreme Court of the United States

JOSE JAVIER AVALOS-GUTIERREZ, PETITIONER

v.

ALBERTO R. GONZALES,
ATTORNEY GENERAL OF THE UNITED STATES, RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a federal court of appeals may refuse to apply this Court's recent decision in *Lopez* v. *Gonzales*, 127 S. Ct. 625 (U.S. 2006), in a case with virtually identical facts that was pending in the Court of Appeals at the same time—thus effectively denying a long-time legal permanent resident his statutory right to pursue cancellation of removal because of a single, state-court deferred adjudication for simple possession of a controlled substance in the amount of less than one gram.

PARTIES TO THE PROCEEDINGS

Petitioner Jose Javier Avalos-Gutierrez was the petitioner in the court below. Alberto R. Gonzales, Attorney General of the United States, was the respondent. There are no other parties.

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INTRODUCTION

This is truly a petition of last resort. After repeated attempts to obtain relief in the Fifth Circuit, Petitioner Jose Javier Avalos-Gutierrez seeks this Court's review of the Fifth Circuit's refusal to recall a mistakenly issued mandate and apply this Court's recent decision in *Lopez* v. *Gonzales*, 127 S. Ct. 625 (2006). This case is indistiguishable from *Lopez*. To date, this Court has granted, vacated, and remanded 62 cases to the Fifth Circuit alone for further consideration in light of *Lopez*. The same result should obtain here.

After more than twenty productive years as a legal permanent resident, Mr. Avalos-Gutierrez was deported a few months ago because of a state court deferred adjudication for simple possession of cocaine in the amount of less than one gram. Once he was placed in deportation proceedings, federal law entitled him to pursue "cancellation of removal." Under then-binding Fifth Circuit precedent, the Immigration Judge and Board of Immigration Appeals (BIA) denied him the ability to pursue that relief because his state felony offense—which would have been a misdemeanor under federal law—was considered an "aggravated felony" under the federal immigration laws. When he appealed to the Fifth Circuit, his appeal was dismissed (with concurrent issuance of the mandate) through a clerical error. In subsequent briefing, however, the Government persuaded the court that the appeal should remain dismissed because of that court's cases resolving the "aggravated felony" issue.

Those cases have now been overturned. Indeed, this Court granted certiorari in *Lopez* on the very same day that the Fifth Circuit issued its order refusing to correct the clerical error and reopen this appeal. Since then, Mr. Avalos-Gutierrez has made repeated attempts—one with the Government's consent—to have the Fifth Circuit reopen the case and apply the decision in *Lopez*.

As discussed below, this Court's "GVR" orders in light of *Lopez* include a case on which the Government expressly relied in defeating Mr. Avalos-Gutierrez's appeal. They also include a case that was dismissed at around the same time on grounds identical to what the Government asserted here. There is no just reason for this case to be treated any differently.

OPINIONS BELOW

The order of the Immigration Judge in the Executive Office for Immigration Review, U.S. Department of Justice, is reprinted at Pet. App. 44a and is not reported. The per curiam decision of the U.S. Court of Appeals for the Fifth Circuit dismissing the related lawsuit is reprinted at Pet. App. 30a and is not reported. The per curiam decision of the Fifth Circuit denying the petitioner's motion to reopen the instant case is reprinted at Pet. App. 29a and is not reported. The per curiam decision of the Fifth Circuit denying the unopposed motion for reconsideration is reprinted at Pet. App. 28a and is not reported. The order of the Fifth Circuit denying Petitioner's petition to recall the mandate is reprinted at Pet. App. 5a and is not reported.

JURISDICTION

The Fifth Circuit entered its denial of the petition to recall the mandate on December 28, 2006. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1). This Court has the power to review the denial of a petition to recall the mandate and has done so in the past. See, *e.g.*, *Lords Landing Village Condo. Council of Unit Owners* v. *Cont'l Ins. Co.*, 520 U.S. 893, 897 (1997) (granting, vacating, and remanding denial of petition to recall the mandate for further consideration in light of new authority).

STATUTORY PROVISION INVOLVED

Under 8 U.S.C. § 1229b(a)(3), the "Attorney General may cancel removal from the United States if the alien * * * has not been convicted of any aggravated felony." The Immigration and Naturalization Act (INA), in rele-

vant part, defines "aggravated felony" as, *inter alia*, "illicit trafficking in a controlled substance * * * including a drug trafficking crime (as defined in section 924(c) of title 18)." 8 U.S.C. § 1101(a)(43)(B). Section 924, in turn, defines "drug trafficking crime" as "any felony punishable under the Controlled Substances Act."

STATEMENT

Petitioner Jose Javier Avalos-Gutierrez first came to the United States as a legal immigrant in 1982, when he was 23 years old. By the time he was erroneously deported, he had lived here as a productive legal resident for 24 years, working and raising children near his extended family in Brownville, Texas.

1. In 1996, Mr. Avalos-Gutierrez was charged in Texas state court with possessing cocaine in the amount of less than one gram. Because this was his first and only offense, and because it did not constitute a serious felony,[1] the State offered him probation and treatment under Texas's deferred adjudication statute. Mr. Avalos-Gutierrez accepted this offer and entered a guilty plea. He diligently completed his drug education program and satisfied all of his obligations under the plea agreement. As a result, under the deferred adjudication law, no finding of guilt or conviction was entered against Mr. Avalos-Gutierrez. See Tex. Code Crim. P. Art. 42.12(5)(c).

Nevertheless, the Government began deportation proceedings based on this offense. In June 2002, the BIA held that the state court "conviction" made Mr. Avalos-Gutierrez removable under the INA. Pet. App. 49a.

When Mr. Avalos-Gutierrez attempted to seek "cancellation of removal," the Immigration Judge held that he was ineligible because the simple possession felony under

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[1] Texas's deferred adjudication statute cannot be applied to serious felonies such as murder, aggravated sexual assault, child molestation, or aggravated robbery. Tex. Code Crim. P. Art 42.12(3)(g)(A)(1).

state law amounted to an "aggravated felony" under the INA—the very theory that this Court later rejected in *Lopez*. Pet. App. 47a. After the BIA affirmed the decision without opinion, Mr. Avalos-Gutierrez filed a petition for habeas corpus in federal district court to review that decision.

At the same time, Mr. Avalos-Gutierrez returned to the BIA, arguing that he was eligible to apply for relief under new regulations. The BIA disagreed. Mr. Avalos-Gutierrez filed a petition for review with the Fifth Circuit to review that decision, and it was assigned Case No. 05-60496 (the "BIA Appeal").

2. The Government moved to dismiss the BIA Appeal based on defects on the face of the petition for review. In short, the Government argued that the court lacked jurisdiction because the petition for review from the BIA's decision did not identify "or even allude[] to" any constitutional or legal issues on its face.

Later, the habeas petition was transferred from the district court to the Fifth Circuit on the Government's motion under Section 106(c) of the REAL ID Act. That appeal was assigned Case No. 05-60779 (the "Habeas Proceeding"). The two appeals were never formally consolidated. The Government did not file another motion to dismiss or brief directed toward defects in the Habeas Proceeding, and the arguments in the pending motion to dismiss did not at all pertain to the habeas petition, which (unlike the petition for review) did in fact assert extensive constitutional and statutory arguments on its face.

On January 24, 2006, the Court granted the motion to dismiss the BIA Appeal. Pet. App. 30a ("respondent's motion to dismiss *petition for review* for lack of jurisdiction is granted") (emphasis added). But although both the court's order and the motion to dismiss were directed *only* to the BIA Appeal and bore only that case number, the Clerk dismissed the Habeas Proceeding as well.

Concerned over the apparent clerical error, counsel for Mr. Avalos-Gutierrez—at the Clerk's suggestion—promptly filed a motion to reopen the Habeas Proceeding. The Government opposed the motion to reopen, arguing *for the first time* that the claims asserted in the habeas petition—and in particular the claim that the state possession offense was not an "aggravated felony"—were foreclosed by previous Fifth Circuit decisions. Thus, the Government argued, while the habeas petition did assert constitutional and statutory claims on its face, the Court lacked jurisdiction because those claims were not "substantial" or "colorable." The Government conceded that the Solicitor General had recently acquiesced in the pending cert petition in *Lopez* v. *Gonzales*, which presented the identical issue. But the Government went on to argue that because its position in *Lopez* was "correct," there was "no reason to hold this case in abeyance pending the outcome of the certiorari petition in *Lopez*."

In reply, Mr. Avalos-Gutierrez argued that the REAL ID Act did not give the Court the ability to decline jurisdiction simply because it believed the petitioner's arguments would not succeed. He also argued that his "aggravated felony" claim was at least colorable, given that other federal courts of appeals had adopted his position and that petitions for writs of certiorari on that precise issue were then pending (with the Government's acquiescence) before the U.S. Supreme Court.

On April 3, 2006, the Fifth Circuit issued a one-sentence order denying the motion to reopen and thereby setting the clerical error in stone. Pet. App. 29a. In so ruling, the court apparently accepted the Government's argument that there was no jurisdiction because the claims—including the "aggravated felony" claim—were precluded by then-current Fifth Circuit case law. *On the very same day* as the Fifth Circuit's denial, however, this Court granted certiorari in *Lopez* v. *Gonzales* to resolve the "aggravated felony" issue. See 126 S. Ct. 1651 (U.S. 2006).

In light of the grant of certiorari in *Lopez*, counsel for Mr. Avalos-Gutierrez obtained the Government's consent and filed an unopposed motion for reconsideration before the Fifth Circuit. He sought an order reopening the case and holding it open until *Lopez* was decided. Counsel for Mr. Avalos-Gutierrez later received the motion back in the mail from the Clerk with the notation that the case was closed and the motion would not be docketed. By that time, however, the time to file a petition for certiorari from the original dismissal of the BIA Appeal—mistakenly extended to the Habeas Proceeding as well—had run.

Later, Mr. Avalos-Gutierrez and his family—including at least one of his U.S. citizen children—were taken without warning from their home and deported to Mexico.[2] Soon after, he reentered illegally to retrieve some belongings. He was apprehended and later pleaded guilty to a charge of misdemeanor illegal reentry. He has since been returned to Mexico. Importantly, as discussed further below, this misdemeanor conviction for illegal reentry is not itself a barrier to his application for cancellation of removal.

While *Lopez* was still pending before this Court, Mr. Avalos-Gutierrez filed a renewed motion for reconsideration in the Fifth Circuit based on a change in the Government's position on whether the REAL ID Act gave that court jurisdiction over a habeas petition in a nearly identical case. In response to a petition for certiorari in *Galindo-Pena* v. *Gonzales*, No. 05-1276, the Solicitor General acknowledged that the REAL ID Act "definitively resolved" that the Fifth Circuit had jurisdiction to review whether a state possession offense is an "aggravated felony" for purposes of federal immigration law. Under that

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[2] In July 2006, another lawyer acting on Mr. Avalos-Gutierrez's behalf attempted to seek this Court's review of the dismissal in this case based on the *Lopez* issue, arguing that the motion to reopen was functionally a petition for rehearing and tolled the time for seeking certiorari. This Court did not accept that argument and declined to docket the matter.

view, there was no basis for the Fifth Circuit to decline jurisdiction over the Habeas Proceeding in this case either. Nevertheless, this motion was denied without explanation. Pet App. 27a.

After *Lopez* was decided in December 2006, Mr. Avalos-Gutierrez filed a motion to recall the mandate based on that decision. The Government opposed this motion, and on December 28, 2006, a single judge denied it without opinion and before receiving Mr. Avalos-Gutierrez's reply. Pet. App. 5a. A panel of that Court later denied a motion for reconsideration, again without explanation. Pet. App. 4a.

REASONS FOR GRANTING THE PETITION

This Court's intervention is warranted here to ensure the Fifth Circuit's fidelity to the *Lopez* decision and—in the Court's exercise of its supervisory power—to avoid a grave injustice. The Fifth Circuit has never considered the effect of *Lopez* on this case. Indeed, as discussed below, the Government has conceded that *Lopez* would control the merits of Mr. Avalos-Gutierrez's claim and would have compelled a different result, if the mandate had not already issued.

Rather than defending the original decision in this case, the Government argued that Mr. Avalos-Gutierrez's reentry after his erroneous deportation made a recall of the mandate unnecessary. For the reasons discussed further below, that is both wrong and unfair. Those subsequent events do not change the fact that the decision in his case was—and is—wrong under *Lopez* and that he should not have been deported in the first place. Under *Lopez*, Mr. Avalos-Gutierrez is entitled to pursue cancellation of removal. Whether the illegal reentry will outweigh all the compelling evidence in favor of cancellation is a question to be resolved by the Immigration Judge, not the Fifth Circuit.

This Court has the power to grant, vacate, and remand a court of appeals' refusal to recall its mandate, and it has

done so previously under analogous circumstances.[3] Since *Lopez*, this Court has already GVR'd 65 other cases presenting the "aggravated felony" issue—62 of those to the Fifth Circuit alone. Pet. App. 1a. Among those cases is one of the very cases on which the Government relied in persuading the Fifth Circuit to decline jurisdiction in this appeal. This case should be treated no differently.

I. The Fifth Circuit Failed To Consider And Apply Controlling Supreme Court Precedent In The Instant Case.

This Court will issue a "GVR" order when "intervening developments, or recent developments that * * * the court below did not fully consider, reveal a reasonable probability that the decision below rests upon a premise that the lower court would reject if given the opportunity for further consideration, and where it appears that such a redetermination may determine the ultimate outcome of the litigation." *Lawrence* v. *Chater*, 516 U.S. 163, 167 (1996).

That is precisely the situation here. The Fifth Circuit has never fully considered the application of *Lopez* in this case, and there can be no doubt that *Lopez* is determinative.

In *Lopez*, this Court decided "whether conduct made a felony under state law but a misdemeanor under the Controlled Substances Act is a "felony punishable under the

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[3] In *Lords Landing Village Condominium Council of Unit Owners* v. *Continental Insurance Co.*, 520 U.S. 893 (1997), this Court GVR'd the Fourth Circuit's denial of a petition to recall the mandate. The Fourth Circuit had determined that, as a matter of Maryland law, an accident as defined in an insurance policy did not include the consequences of a negligent act. *Id.* at 895. The Maryland Supreme Court, however, held the opposite shortly before the Fourth Circuit's decision. *Ibid.* When they learned of that new decision, plaintiffs filed a motion to recall the mandate, which the Fourth Circuit denied without opinion. *Ibid.* This Court sent the case back for the Fourth Circuit to apply the new authority. *Id.* at 897.

Controlled Substances Act." 127 S. Ct. 625, 627 (U.S. 2006). Like Mr. Avalos-Gutierrez, Jose Antonio Lopez was a legal resident of the United States when he was arrested on a state drug charge. *Id.* at 627. Lopez pled guilty to aiding and abetting another person's possession of cocaine, and the Government moved to deport him. *Id.* at 627. Legal residents can be removed from the country for conviction of a controlled substance offense, but they may be entitled to apply for "cancellation of removal" if the offense does not constitute an "aggravated felony." 8 U.S.C. §§ 1227(a)(2)(b)(i), 1229b(a)(3). The term "aggravated felony" includes "illicit trafficking in a controlled substance * * * including a drug trafficking crime (as defined in section 924(c) of title 18)." § 1101(a)(43)(B). Section 924(c), in turn, defines "drug trafficking crime" as "any felony punishable under the Controlled Substances Act."

The Court, in a 8-1 decision, held that a state possession charge did not constitute an "aggravated felony" for purposes of the immigration laws. 127 S. Ct. at 627. Simple possession does not rise to the level of "illicit trafficking," which denotes the buying and selling of drugs. *Id.* at 629-30. Furthermore, simple possession is generally a misdemeanor under the Controlled Substances Act (CSA), and the phrase "any felony punishable under the Controlled Substances Act" requires that the CSA define the crime as a felony. *Id.* at 628. In so holding, the Court specifically rejected the rule previously followed by the Fifth Circuit. *Id.* at 629 n.3 (citing, *e.g.*, *United States* v. *Hinojosa-Lopez*, 130 F.3d 691 (5th Cir. 1997)).

Like the petitioner in *Lopez*, Mr. Avalos-Gutierrez was charged with simple possession, a felony under state law but a misdemeanor under the CSA. The Government sought to deny him the ability to pursue cancellation of removal under the same legal theory as in *Lopez*—namely, that simple possession constituted an "aggravated felony" under the INA. Pet. App. 47a. And based on then-binding case in the Fifth Circuit, the Immigration Judge and BIA agreed. *Ibid.* Under *Lopez*, however, those Fifth Circuit

cases are wrong, and thus the result in Mr. Avalos-Guterriez's case is wrong as well.

The Government has conceded that under *Lopez*, Mr. Avalos-Gutierrez would have the statutory right to seek cancellation of removal—the very right he was denied by the Immigration Judge and the BIA. In response to the motion to recall the mandate, the Government explained that after *Lopez*, Mr. Avalos-Gutierrez's crime "can no longer be considered an 'aggravated felony' for purposes of precluding relief from removal in the form of cancellation of removal pursuant to 8 U.S.C. § 1229b(a); thus, if the Court had not already dismissed his petition for review and issued its mandate, he would have been at least statutorily eligible for this discretionary form of relief from removal." Pet. App. 12a.

Particularly in light of this concession, the fact that *Lopez* was briefed in the Fifth Circuit in the context of the motion to recall the mandate cannot serve as evidence that the Court fully considered, but ultimately rejected, the impact of *Lopez*. In *Lords Landing*, for example, this Court vacated the denial of a motion to recall the mandate when the Fourth Circuit, after briefing, indicated only that the motion was "without merit." 520 U.S. at 895. Chief Justice Rehnquist argued in dissent that the Fourth Circuit opinion indicated that it had considered the supervening authority at issue. *Id.* at 897-98 (Rehnquist, C.J., dissenting). The majority, however, held that "the Court of Appeals' ambiguous statement that petitioners' request was 'without merit' does not establish that it actually considered and rejected" the movant's argument based on the intervening authority. *Id.* at 896. This case is even clearer, as it is undisputed that *Lopez*—if applied here—would require a different result than the one reached in this case by the Fifth Circuit.

Indeed, one of the cases on which the Government relied in its effort to defeat the instant appeal has itself been vacated by this Court and sent back for application of *Lopez*. In opposing the motion to correct the clerical error

and reopen this appeal, the Government relied heavily on *Salazar-Regino* v. *Trominski*, 415 F.3d 436, 448 (5th Cir. 2005), in which the Fifth Circuit reaffirmed its holding on the "aggravated felony" issue. *Salazar-Regino* has now been vacated, see *Salazar-Regino* v. *Moore*, 127 S. Ct. 827 (U.S. 2006), and the Fifth Circuit recently sent the case back to the Board of Immigration Appeals for further proceedings, *Salazar-Regino v. Moore*, __ F.3d __, 2007 WL 457992 (5th Cir. Feb. 13, 2007). Surely if *Lopez* applies in that case, it should apply here as well.

This Court has also vacated the decision in at least one case that was dismissed on the same jurisdictional ground that the Government asserted here (in opposing the motion to reopen). The Fifth Circuit dismissed *Galindo-Pena v. Gonzales* for lack of jurisdiction less than two weeks before it dismissed Mr. Avalos-Gutierrez's two appeals. The Government there had offered the same argument that it later made in this case: that the court should deny jurisdiction because the "aggravated felony" issue had already been resolved conclusively in the Fifth Circuit. In response to a petition for certiorari in that case, however, the Solicitor General agreed that after the REAL ID Act "definitively resolved" that the courts of appeals have jurisdiction over such cases. On the merits of the "aggravated felony" question, the case was held for *Lopez* and was recently granted, vacated, and remanded to the Fifth Circuit. *Galindo-Pena*, 127 S. Ct. 828 (U.S. 2006).

These two cases are not alone. In all, 65 cases have been GVR'd in light of this Court's decision in *Lopez*. Mr. Avalos-Gutierrez should be afforded the same relief.

II. Mr. Avalos-Gutierrez's Reentry After He Was Erroneously Deported Did Not Give The Fifth Circuit A Legitimate Basis For Refusing To Apply *Lopez*.

The Government opposed Mr. Avalos-Gutierrez's petition to recall the mandate on the ground that he had reentered the country illegally after he had been unjustly

deported. According to the Government, that illegal reentry made it impossible for him to establish the "injustice" required before the Fifth Circuit will recall the mandate. Pet. App. 9a; Fifth Cir. Rule 41.2 (mandate should be recalled only "to prevent injustice").

At the same time, however, the Government conceded that both of the factors ordinarily required to show such "injustice" were present here. Under the Fifth Circuit's own cases, a petitioner has shown sufficient "injustice" to warrant recall of the mandate if a subsequent Supreme Court decision renders a Fifth Circuit decision "demonstrably wrong" or creates a "danger of incongruent results in cases pending at the same time." *U.S.* v. *Tolliver*, 116 F.3d 120, 123 (5th Cir. 1997) (quoting *American Iron & Steel Inst.* v. *E.P.A.*, 560 F.2d 589, 594 (3d Cir. 1977)). Here, the Government agreed that Mr. Avalos-Gutierrez's case would have come out differently under *Lopez*, and it also conceded that allowing the mandate to stand would create inconsistent results in cases pending at the same time. Pet. App. 10a-11a. According to the Government, however, the illegal reentry was still somehow a bar to future relief.[4] *Ibid.*

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[4] The Government also argued that Mr. Avalos-Gutierrez "waived the issue decided in *Lopez*" when no petition for certiorari was filed on his behalf within the first 90 days after the original, mistaken dismissal. Pet App. 9a. But under the Fifth Circuit's own precedents, that argument was meritless and cannot have formed the basis for the Court's refusal to recall the mandate. In *Tolliver*, the Fifth Circuit held that recall of the mandate was necessary in order to avoid inconsistent results in contemporaneous cases when one defendant had sought certiorari and a stay of the mandate and another had not. *Tolliver*, 116 F.3d at 123-24; accord *Gradsky* v. *United States*, 376 F.2d 993, 995 (5th Cir. 1967). Thus in the Fifth Circuit, the absence of a petition for certiorari is a *basis for*—not a barrier to—recall of the mandate. In any case, given the extensive motion practice in this case, there can be no serious argument that the *Lopez* issue was voluntarily "waived." To the contrary, when the original 90 days for seeking certiorari expired, the parties were

The Government's emphasis on the illegal reentry was both premature and highly unfair. Mr. Avalos-Gutierrez should never have been deported in the first place. He was deported at a time when this Court had under its consideration the very issue that would have enabled him to pursue cancellation of removal—relief that he would almost certainly have received, had the correct statutory interpretation been applied in his case from the beginning.

Moreover, Mr. Avalos-Gutierrez's misdemeanor conviction for illegal reentry is not a barrier to his application for cancellation of removal. Under 8 U.S.C. § 1229b(a), a legal permanent resident who has lived in the United States for as long as Mr. Avalos-Gutierrez is eligible for cancellation of removal unless he has been convicted "of an aggravated felony." Obviously, a misdemeanor illegal reentry conviction is not an "aggravated felony," just as his state deferred adjudication was not.

The issue before the Fifth Circuit—and now before this Court—is merely whether Mr. Avalos-Gutierrez should be allowed to *pursue* cancellation of removal, not whether he will ultimately receive it. And there is no longer any dispute that he had the right to pursue cancellation under the statute. Although this relief is ultimately discretionary, the decision will be made by an Immigration Judge based on evidence about the immigrant's life—evidence that Mr. Avalos-Gutierrez has never had the opportunity to present. Denying him his statutory right to present such evidence is itself a grave injustice.

In support of his application for cancellation, Mr. Avalos-Gutierrez would show that he lived in the United States productively for more than 20 years, near his parents, grandparents, and extended family in Brownsville, Texas. He would show that he practiced a trade, paid taxes, and worked to support his family. He would show

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awaiting a ruling on an *Unopposed* Motion for Reconsideration that expressly sought to reopen the appeal and hold it open pending this Court's decision in *Lopez*.

that he is of good moral character and, along with his wife, is raising children who are bright and accomplished. He would show that his deportation resulted in extreme hardship to his U.S. citizen children—since remaining with their parents would mean separation from their home, school, necessary medical care, and extended family. While he was once arrested for possessing a tiny amount of cocaine (more than ten years ago), he would show that he successfully completed a drug education program and satisfied all conditions of his probation, so that he is entitled to have the deferred adjudication charge removed from his record in Texas. And while there would also be evidence that he reentered after his deportation, he would have the opportunity to explain those events—including the fact that he would never have been deported in the first place if he had been allowed to pursue the relief for which he was and is eligible under the INA.

Whether the illegal reentry will trump all the other very compelling evidence in support of cancellation should be left to the Immigration Judge and the BIA. The question for this Court is whether Mr. Avalos-Gutierrez is entitled to pursue this relief in the first place. Under *Lopez*, the answer is yes.

CONCLUSION

Petitioner respectfully asks that the petition for a writ of certiorari be granted, the Fifth Circuit's order vacated, and the case remanded to the Fifth Circuit for further consideration in light of this Court's decision in *Lopez*. Indeed, in light of the Government's concession that *Lopez* would compel a different result in this case, Petitioner respectfully submits that a summary reversal would be warranted. Alternatively, Petitioner asks that the Court grant the petition and set the case for plenary review.

Respectfully submitted,

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